No. 624

In the Supreme Court of the United States

October Term, 1968

Clyde A. Perkins, *Petitioner*

vs.

Standard Oil Company of California

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Respondent in Opposition

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet.App. 3a-16a) is reported at 396 F.2d 809. The Court of Appeals' opinions denying petitioner's motion for rehearing (Pet.App. 2a-3a) and in response to petitioner's motion for clarification (Pet. App. 1a) are unreported. Judge East, in the trial court, rendered no opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on November 2, 1967. The petition for rehearing was denied on July 11, 1968. The petition for a writ of certiorari was filed on October 9, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Respondent Standard Oil Company of California (Standard) sold gasoline to petitioner Perkins, a wholesaler.[1] At the same time, Standard sold gasoline to Signal Oil and Gas Company (Signal) at a slightly lower price. Signal in turn resold the gasoline to Western Hyway Oil Company (Western), a wholesaler. Western in turn resold the gasoline to Regal Stations Company (Regal), a retailer, which allegedly cut prices to the injury of petitioner.

The question is whether the Court of Appeals correctly held that the provisions of Section 2(a) of the Clayton Act relating to injury at three designated levels of competition do not give a cause of action to a person who claims to have been injured by a price discrimination allegedly passed on to the fourth level of competition, i.e., at the distribution level of a customer of a customer of the favored purchaser from the original seller.

STATEMENT

The petition states a case in which Standard, "a billion dollar corporation" (Pet. 5), with "predatory" intent (Pet. 12), made sales to Signal at discriminatory prices with "every reason to know that Signal would pass along to Regal those discriminatory price advantages in order to injure Perkins" (Pet. 20-21); that the favorable price differential to Signal in fact was passed on to Regal in such an amount that it "enabled Regal to break the market" (Pet. 11), thus driving Perkins out of business.

This statement is inaccurate. The relevant facts are as follows:

Standard sold gasoline to petitioner, a wholesaler. At the same time, Standard sold gasoline to Signal. Signal in turn resold the gasoline to Western, a wholesaler. Western in turn resold the gasoline to Regal, a service station operator. At the trial petitioner claimed that Regal, immediately

1. Petitioner also operated retail stations. See pp. 5, 12, infra.

upon opening its first station in Portland, dropped the retail price 4 cents a gallon (Tr. 369), thus precipitating a price war which spread throughout petitioner's marketing area. Actually, at the time Regal opened its station in September, 1956, Standard's prices to Signal were *higher* than its prices to petitioner, and continued higher until January 1, 1957 (footnote 4, p. 4, infra).[2] And from January 1, 1957, until December 2, 1957 (the end of the period covered by this case), Standard's price differentials in favor of Signal varied from thirty-six one hundredths of a cent to forty-five one hundredths of a cent, except for two days when it reached a high of sixty-eight one hundredths of a cent (footnote 5, p. 5, infra).[3]

But even these small differentials were immediately lost in the distributive system. Signal did not sell directly to Regal, the alleged price cutter. It sold to Western, a wholesaler, which in turn sold to Regal. And Signal retained at its level of distribution the small price differential, for when Regal opened the first of its three stations, in September, 1956, Regal's supplier, Western, was charged a higher price by Signal than Standard was charging at the same time to

2. In January, 1957, Standard made a retroactive adjustment to Signal of sixty-five one hundredths of a cent per gallon for gasoline purchased in 1956. This adjustment was retained by Signal and was not passed on to Western who in turn sold to Regal (Exh. 1458-A; Tr. 4745, 4747). However, even if the adjustment were applied retroactively, it would have given Signal a price advantage of only thirty-seven one hundredths of a cent over Perkins (Exh. 1550; See footnote 4, p. 4, infra).

3. These random differentials, obviously too small to have any bearing upon the retail price wars of which petitioner complains, were due to the fact that Standard's prices to Signal were determined by an over-all contract applicable to all of Signal's purchases from Standard throughout the Western States. Signal is a large integrated oil company. It is a substantial producer of crude oil. During the period involved, it sold crude oil (some 45,000 barrels a day) to Standard (Tr. 5454). Standard refined the crude oil and returned to Signal the gasoline Signal required to supply its entire market.

petitioner (see footnote 5, p. 5, infra). This situation continued until June, 1957, when price increases by Standard resulted in petitioner paying to Standard prices higher than Western paid to Signal of thirty-five ten thousands of a cent from June until November, and, in the month of November, of from eighty-seven one thousandths of a cent to a top of approximately one tenth of a cent.

There is no evidence in the record of the price Regal paid to Western.

In footnotes, we set out (1) the prices charged by Standard to petitioner for gasoline resold in the area where Regal operated and the prices charged at the same time to Signal for gasoline ultimately distributed by Regal,[4] and (2) the prices charged by Signal to Western (Regal's supplier)

4. Exhibit 1550:

	Signal Oil and Gas Company — Net Prices —		C. A. Perkins Net Proceeds Payable to Standard at Willbridge—Destination — Vancouver—Ex Tax —		Difference Between Signal Oil and Gas Company Net Prices and C. A. Perkins Net Proceeds	
Date	Regular	Ethyl	Regular	Ethyl	Regular	Ethyl
*8/27/56-12/31/56	.129	.149	.1262	.1462	.0028	.0028
1/ 1/57- 1/16/57	.1224	.1424	.1262	.1462	(.0038)	(.0038)
1/17/57- 3/18/57	.1274	.1474	.1312	.1512	(.0038)	(.0038)
3/19/57- 3/25/57	.1274	.1474	.131035	.151035	(.003635)	(.003635)
3/26/57- 3/31/57	.1274	.1474	.131035	.151035	(.003635)	(.003635)
4/ 1/57- 4/ 2/57	.1272	.1472	.131035	.151035	(.003835)	(.003835)
4/ 3/57- 6/17/57	.1292	.1512	.133035	.155035	(.003835)	(.003835)
6/18/57- 6/21/57	.1292	.1512	.133035	.155035	(.003835)	(.003835)
6/22/57- 6/23/57	.1292	.1512	.136035	.158035	(.006835)	(.006835)
6/24/57- 6/30/57	.1322	.1542	.136035	.158035	(.003835)	(.003835)
7/ 1/57-11/20/57	.1315	.1535	.136035	.158035	(.004535)	(.004535)
11/21/57-12/ 2/57	.1315	.1535	.13587	.15787	(.00437)	(.00437)

In January, 1957 a payment was agreed upon and made by Standard to Signal Oil and Gas Company upon the basis of $.0065 per gallon of gasoline delivered by Standard to Signal Oil and Gas Company during the period 8/27/56 through 12/31/56.

*Date of first delivery to Signal Oil and Gas Company at Willbridge.

and the prices charged at the same time by Standard to petitioner.[5]

Branded Dealers. While petitioner operated principally as a wholesaler, he also operated service stations. Standard sold gasoline to its own branded service stations at the posted tank-truck price. Perkins bought all of his gasoline, including the gasoline he sold at retail, at the jobber price (wholesale) of 4 to 5½ cents per gallon below the posted tank-truck price (Tr. 365, Exhs. 24BBB, 24CCC, 1448, 1511A, 1511B). During price wars Standard temporarily reduced its price to dealers whenever the retail prices at competitive major brand stations declined below designated levels (Exhs. 1453A, 1453B; Tr. 4915-4917).

It is not true, as petitioner states (Pet. 10), that Standard's "retail Branded Dealers [during price wars] often purchased gasoline from Standard at lower net prices than Perkins, who operated primarily as a wholesaler." In fact, except for one week in the town of Centralia, Washington, Standard's prices to Perkins were always lower than its

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5.

	Ethyl		Regular	
Date of Change	Standard's price to Perkins, destination Vancouver (1)	Signal Oil and Gas Company's price to Western Hyway (2)	Perkins payable to Standard, destination Vancouver (1)	Signal Oil and Gas Company's price to Western Hyway (2)
8/27/56	14.62	15.30	12.62	13.30
1/17/57	15.12	15.30	13.12	13.30
1/21/57	15.12	15.80	13.12	13.80
3/19/57	15.1035	15.80	13.1035	13.80
4/ 3/57	15.5035	15.80	13.3035	13.80
4/15/57	15.5035	15.80	13.3035	13.60
6/22/57	15.8035	15.80	13.6035	13.60
11/ 1/57	15.8035	15.70	13.6035	13.50
11/21/57	15.787	15.70	13.587	13.50

Source: (1) Exh. 1550.
(2) Exh. 1458-A.

prices to its own dealers. (Exhs. 1456-A, 1457-A, 1463, 1467, 1477-1483, 1485, 1488-1491, 1493-1495, 1497, 1500.)[6]

Standard's branded dealers sold gasoline under the Standard brand names, used Standard's credit cards, and were given a one-fourth of a cent per gallon allowance for the maintenance of clean rest rooms (Tr. 487, 1593). Petitioner also refers to advertising allowances, free delivery services, and free station painting (Pet. 10). There is no evidence in the record relating to "free delivery services." The only evidence in the entire record as to advertising and painting allowances to any of Standard's numerous dealers is the testimony of one dealer in Portland that Standard once painted his station and once gave him an advertising allowance, in an unspecified total amount of one-tenth of a cent per gallon for up to 50 per cent of his advertising expense. (Tr. 478).[7]

The Proceeding Below.

The Court of Appeals reversed the judgment for petitioner and remanded the case for a new trial. It held that a substantial portion of the award rested on the activities of Regal and that no claim of damage could be based on that company's activities, since it was neither a customer of Standard nor a customer of the favored purchaser from Standard (Pet.App. 7a-8a). The court further held that it was error to submit to the jury Perkins' claims of Standard's alleged violations of Sections 2(d) and 2(e) with respect to branded dealers to the extent that Perkins operated

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6. For one week during a price war in October, 1955, the temporary assistance given by Standard to four of its dealers in one price zone in the town of Centralia resulted in a price one cent lower than Standard's price to Perkins on regular gasoline, but not on Ethyl (Exh. 1497). At no other time during the period covered by this suit did any of Standard's branded dealers ever receive a lower price than petitioner.

7. As to Standard's allowances to dealers see p. 12, infra.

as a wholesaler, leaving Perkins free on retrial to show damages for such violations, if any, to the extent he operated as a retailer (Pet.App. 11a, 2a-3a). It further held that certain damage items of Perkins individually were erroneously submitted to the jury (Pet.App. 12a-14a), and that the trial court erred in admitting damage computations not supported by the evidence (Pet.App. 14a-15a). It also held that error was committed by the court in the exclusion of evidence and in its instructions to the jury relating to respondent's "good faith meeting of competition" defense (Pet. App. 15a-16a). And finally it adverted to numerous other errors urged by respondent which it said it would not pass upon for the reason that it felt that such errors were not likely to occur in a new trial—expressly stating that its failure to discuss these errors was not to be taken as approval of the rulings complained of (Pet.App. 16a).

ARGUMENT

1. The decision of the court below that the clause of section 2(a) of the Robinson-Patman Act relating to injury to specific levels of competitors does not give a cause of action for claimed injury caused by a price discrimination allegedly passed on to the fourth level of competition is clearly correct. There is no conflict of decisions. Indeed, in the thirty-two years since the enactment of the Act no one has even raised the question.

The language of the statute is specific. Section 2(a) makes it unlawful for:

> "... any person engaged in commerce ... to discriminate in price between different purchasers of commodities of like grade and quality, ... where the effect of such discrimination may be ... to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them ..."

This section was added to make clear that proof of a violation no longer required a showing of injury to competitive conditions in a whole market, where injury to the competitive position of a single marketer on the primary, secondary, or tertiary line of competition is established (see Hearings on H.R. 8442, H.R. 4995 and H.R. 5062, before House Committee on the Judiciary, 74th Cong., 1st Sess., pp. 251-252 (1935); 80 Cong.Rec. 3113 (1936) (remarks of Senator Logan)). The chairman of the House subcommittee which considered the bill specifically stated that the Act was intended to extend only to the third line of competition, i.e., to customers of either "the grantor or grantee."[8]

Nowhere in the Committee reports, in any decision of any court with which we are familiar, or in the writings of any commentators is there any suggestion that the Robinson-Patman amendments were intended to give a cause of action to persons injured at levels of competition more remote than customers on the third level of competition.[9]

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8. 80 Cong. Rec. 9417 (1936) (remarks of Rep. Utterback):

"EFFECT ON COMPETITION

The discriminations prohibited by this bill are those whose effect may be:

1. Substantially to lessen competition in any line of commerce; or,
2. To tend to create a monopoly in any line of commerce; or,
3. To injure, destroy, or prevent competition:
   (a) With any person who either grants or knowingly receives the benefit of such discrimination; or,
   (b) With customers of either of them (i. e., the grantor or grantee)."

9. In the leading texts on the Robinson-Patman Act the authors discuss fully the Robinson-Patman amendment and describe its coverage at the primary, secondary and tertiary lines. Nowhere is it suggested that the amendment was intended to cover subsequent levels of distribution. See Rowe, Price Discrimination Under the Robinson-Patman Act (1962), pp. 36-37, 141 et seq., 172 et seq.; Patman, Complete Guide to Robinson-Patman Act (1963), pp. 47, 49; Kintner, An Antitrust Primer (1964), pp. 61, 64-68.

If the language of the statute is disregarded to give a cause of action to persons allegedly injured at the fourth level of competition, it can as logically be construed to extend to the fifth, sixth or subsequent levels. It is consistent with the Congressional purpose, and required by the Congressional language, to recognize that the scope of the 1936 extension of the statutory reach was not limitless, but was confined to those levels of competition where a price discrimination can reasonably be assumed to have an identifiable impact upon a particular marketer. Indeed, the present record exemplifies that proof of causation so far down a chain of distribution deteriorates into impermissible guesswork and speculation.

While this Ccurt has never had occasion to consider the point, the language of its decision in *Federal Trade Comm'n v. Sun Oil Co.* (1963) 371 U.S. 505, 514-515, is pertinent:

> "Reading the words to have 'their normal and customary meaning,' *Schwegmann Bros. v. Calvert Corp.*, 341 U. S. 384, 388, the § 2 (b) phrase 'equally low price of a competitor' would seem to refer to the price of a competitor of the seller who grants, and not of the buyer who receives, the discriminatory price cut. (In this case, this would mean a competitor of Sun, the refiner-supplier, and not a competitor of McLean, the retail dealer.) Were something more intended by Congress, we would have expected a more explicit recitation as, for example, is the case in § 2 (a) in which the intent to give broader scope was expressly effected by the prohibition of price discriminations which, *inter alia,* adversely affected competition not only with the seller (in this case Sun) who grants the favored price, but with the knowing recipient thereof (in this case McLean) and 'with customers of either of them.' Thus, since Congress expressly demonstrated in the immediately preceding provision of the Act that it knew how to expand the applicable concept of competition

beyond the sole level of the seller granting the discriminatory price, it is reasonable to conclude that like clarity of expression would be present in § 2 (b) if the defense available thereunder were similarly intended to be broadly read to encompass, as is urged, the meeting of lower prices set not only by the offending seller's competitor, but also by the purchaser's competitor. There is no reason appearing on the face of the statute to assume that Congress intended to invoke by omission in § 2 (b) the same broad meaning of competition or competitor which it explicitly provided by inclusion in § 2 (a); the reasonable inference is quite the contrary."[10]

Actually petitioner does not seriously attack the ruling of the Court of Appeals on this point. He cites no authorities and criticizes the court's decision only in passing and in general terms (Pet. 14-15). He relies principally on the point next considered.

2. Petitioner contends that, accepting *arguendo* the ruling of the Court of Appeals that fourth-line injury is not cognizable under the Robinson-Patman amendments to the original Clayton Act (Pet. 15-16), the jury in this case "could properly have found that the effect of Standard's price discrimination was 'substantially to lessen competition * * * in any line of commerce,' i.e., the wholesale and retail marketing of gasoline in the Pacific Northwest" (Pet. 16), and that, therefore, he is entitled to recover because the original provisions of Section 2, which were unchanged by the Robinson-Patman amendments, give a cause of action to any person injured by a price discrimination, the effect of which "may tend substantially to lessen competition 'in any

10. See also *F.T.C. v. Anheuser-Busch, Inc.* (1960) 363 U.S. 536, 542-543; *Klein v. Lionel Corporation* (3 Cir. 1956) 237 F.2d 13, 15.

line of commerce' " (Pet. 23), regardless of the level of distribution at which the injury occurs. Specifically, petitioner states that nothing "justifies the Ninth Circuit's holding that petitioner's proof, which satisfied the stricter standard of the original Section 2, provides no basis for a cause of action" (*ibid.*).

The Court of Appeals made no such holding. Petitioner did not raise the point in that court and, therefore, nowhere in the opinion of the court is it mentioned or discussed.

Whether the record in this case, directed primarily to a showing of competitive injury to petitioner, would support a finding that, as a result of Standard's slight price discrimination in favor of Signal, competition in "the wholesale and retail marketing of gasoline in the Pacific Northwest" (Pet. 16) was lessened depends upon the facts in the more than 6,000 pages of transcript and over 1,000 exhibits of the record. Respondent submits no such finding can be made on the record. And this would seem readily apparent since the negligible price discrimination was not passed on by Signal. In any event, if there is merit in the point, raised *de novo* in this Court, it is open to a resolution on the retrial.

3. Petitioner contends that since Signal owned 60 per cent of the stock of Western, and Western owned 55 per cent of the stock of Regal, the separate corporate entities of these companies should have been disregarded and Signal, Western and Regal treated as one entity. Otherwise, he argues, powerful buyers and sellers could circumvent the statute by the device of creating separate subsidiaries (Pet. 26).

The rule applied by the Court of Appeals does not lend itself to misuse. The court held that if in fact the subsidiaries were controlled, their separate identities could be disregarded (Pet.App. 8a-9a). It pointed out, however, that

there is no evidence in this record that the corporate decisions of either Western or Regal were dictated.[11]

On the retrial of this case petitioner will be free to attempt to prove that there is a basis for disregarding the separate corporate entities.

4. Petitioner complains that during the price wars caused by Regal, Standard subsidized its own branded dealers without giving petitioner comparable assistance, and that Standard gave allowances and services to its dealers not made available to the stations operated and supplied by petitioner (Pet. 10-11).

Standard's dealers did not have a more favorable price (see p. 5, supra). Indeed, petitioner purchased from Standard at the jobber's (wholesale) discount of 4 to 5½ cents lower than Standard's normal price to its dealers (see p. 5, supra).

As to allowances, the court below expressly left it open for petitioner to prove on the retrial any injuries he may have suffered, as a retailer, from discriminatory allowances and services, if any, accorded to Standard's own dealers but denied to petitioner (Pet.App. 11a, 2a-3a).

5. Finally, petitioner says that he and Signal were competing wholesalers (Pet. 9, 16, 24) and that the court below

11. Petitioner's description of Western (Pet. 7) is misleading. Forty per cent of the stock of Western was owned by three individuals who were officers of Western and strangers to Signal (Tr. 4739). Western was a large wholesaler of petroleum products with a marine terminal in Sacramento, supplying wholesalers and retailers (Tr. 4738). During 1957 it bought more than 50 per cent of its total volume from suppliers other than Signal (Tr. 415; Exhs. 1711, 1458D). Western owned 55 per cent of the stock of Regal which operated three service stations in Portland. The balance of Regal's stock was owned by several individuals not otherwise connected with Western or Signal (Tr. 4740). There was no evidence that Signal ever directed or controlled the activities of Western or of Regal.

should have affirmed the judgment on the ground that petitioner was injured at the secondary level.[12]

This question was not passed upon by the Court of Appeals, the thrust of petitioner's whole case having been directed to his claim of injury by Regal at the fourth level of distribution. Respondent knows of no evidence in the record that petitioner and Signal ever competed for the trade of anyone. Be that as it may, petitioner's contention that he suffered injury at the secondary level raises a factual issue which was not passed upon by the court below and which turns upon all of the evidence in this large record. Here again petitioner is free to prove on the retrial any injury he may have suffered at the secondary level.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 7, 1968.

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12. It is not true as petitioner asserts (Pet. 24), that the trial court "submitted to the jury the question whether Standard's favored purchaser (Signal) and its disfavored purchaser (Perkins) were competitors." Petitioner cites pages 6341-42 and 6347 of the transcript. At pages 6341-42 the trial court was merely stating the contentions of the parties. Page 6347 says nothing about the point. In fact, this question was not submitted to the jury.